Supreme Court, U.S.
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No. 92-967

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

FRANK BILLOTTI,
Petitioner,

v.

CARL LEGURSKY, *Warden,*
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI
(Revised)

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QUESTIONS PRESENTED

The State of West Virginia is not satisfied with Mr. Billotti's characterization of the questions fairly presented by his petition for certiorari, and therefor restates them below.

Question I. Whether West Virginia's system of discretionary appeals provided petitioner with procedural due process following his conviction for first degree murder, where he was afforded appellate counsel and a complete transcript of his trial and his counsel orally presented a timely written petition for appeal to all five justices of the State's only appellate court.

Question II. Whether due process requires that a jury be given guidelines to control its determination of whether to "grant mercy" to a defendant subject to life imprisonment, where such mercy, if granted, would render the defendant eligible for parole after serving ten years of his life sentence.

Question III. Whether the due process clause required the State to produce expert testimony as part of its proof of petitioner's sanity, or whether it could properly rely on lay testimony to rebut petitioner's affirmative defense.

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TEXT OF PERTINENT STATUTES, ETC.

United States Constitution, art. XIV, § 1, provides, in part;

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

West Virginia Constitution, art. VIII, § 4, provides, in part;

> A writ or error, supersedeas or appeal shall be allowed by the supreme court of appeals, or a justice thereof, only upon a petition assigning error in the judgment or proceedings of a court and then only after the court, or a justice thereof shall have examined and considered the record and is satisfied that there probably is error in the record, or that it presents a point proper for the consideration of the court.

West Virginia Code § 58-5-1, provides, in part;

> A party to a controversy in any circuit court may obtain from the supreme court of appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supersedeas to, a judgment, decree or order of such circuit court in the following cases . . . In any criminal case where there has been a conviction in a circuit court or a conviction in an inferior court which has been affirmed in a circuit court.

West Virginia Code § 53-4A-1(a), provides, in part;

> Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if any only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence. Any such petition shall be filed with the clerk of the supreme court of appeals, or the clerk of any circuit court, said supreme court of appeals and all circuit courts of this State having been granted original jurisdiction in habeas corpus cases by the Constitution of this State or with the clerk of any court of record of limited jurisdiction having criminal jurisdiction in this State. Jurisdiction is hereby conferred upon each and every such court of record of limited jurisdiction having criminal jurisdiction (hereinafter for convenience of reference referred to simply as a "statutory court") to refuse or grant writs of habeas

corpus ad subjiciendum in accordance with the provisions of this article and to hear and determine any contention or contentions and to pass upon all grounds in fact or law relied upon in support thereof in any proceeding on any such writ made returnable thereto in accordance with the provisions of this article. All proceedings in accordance with this article shall be civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case.

West Virginia Rules of Appellate Procedure 4, provides, in part;

Presentation of Petition. (a) *Filing with Clerk.* When the appeal is from an order of the circuit court, eight copies of the petition for appeal shall be filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered. The circuit clerk shall note on each copy of the date on which the petition for appeal was filed. There shall be attached to the original petition a memorandum of parties who have appeared in the action from which the appeal is sought, together with the names and addresses of their counsel of record if any.

(b) Transmission to the Supreme Court. The circuit clerk shall retain one copy of the petition and, within twenty days from deposit of money or bond for costs under subparagraph (d), shall transmit seven copies of the petition, along with the trial court record as designated in paragraph (c), to the Clerk of the Supreme Court of by the United States certified mail.

(c) Record on Petition. The appellant shall designate by itemization to the clerk of the circuit court such

pleadings, orders and exhibits to enable the Supreme Court to decide the matters arising in the petition.

West Virginia Rules of Appellate Procedure 5, provides, in part;

Hearing on Petition *(a) Time for Hearing.* Within thirty days from the date of receipt of the petition and record by the Clerk of the Supreme Court, counsel may request oral presentation on the petition on any regularly scheduled motion day thereafter. Such request shall be made tot he Clerk of the Supreme Court in writing or by telephone. Oral presentation will be heard in the order in which such requests were made. Oral presentation will not be heard, except upon motion for good cause shown, prior to expiration of the period allowed for filing a response as provide in Rule 3(f)

(b) Oral Presentation. Oral presentation shall be limited to ten minutes, unless additional time is granted by the Court.

West Virginia Rules of Appellate Procedure 7, provides, in part;

Rejection or Allowance of Appeal. *(a) Rejection.* If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petition may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.

(b) Renewal of Petition. A petition desiring to renew a petition may notify the Clerk of the Supreme Court of his intention in writing within thirty days after the entry of the order denying his application. In such case, the Clerk shall retain the petition and record in the Supreme Court, the petition may be reheard in accordance with Rule 5, and an amended petition or supplemental argument may be filed.

If the Clerk of the Supreme Court receives no timely notice of the petitioner's intention to renew, he shall return the record to the circuit clerk, who shall repay the petition any money deposited under Rule 4(d) or Rule 4A(e), in excess of fees and expenses.

(c) Allowance. If the petition for appeal is granted:

(1) The Clerk of the Supreme Court shall docket the same and immediately send a copy of the order granting the appeal to the petitioner's counsel, or, if there is no counsel of record, to the petition, and to the clerk of the circuit court, who shall retain the same in his records.

(2) The Clerk of the Supreme Court shall forthwith return the record to the clerk of the circuit court for preparation of the record of the case for appeal in accordance with Rules 8 and 9.

(3) The Clerk of the Supreme Court shall then issue summons against all parties appearing of record, other than the petitioner, that they may be heard, and shall also issue any supersedeas which may have been awarded.

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STATEMENT OF THE CASE

A. Procedural History

During the night of October 8, 1982, petitioner shot and killed his wife, Carolyn, and their two teenage daughters, Andrea and Francie, with a 12-gauge shotgun (Tr. at 398, 404, 418, 466, 468-69, 509). After killing his family, petitioner shot himself in the head (Tr. at 398, 468-69). He lost an eye, but survived to stand trial. More than a year later, he was convicted of three counts of first-degree murder and sentenced by the Circuit Court of Monongalia County[1] to life in prison with no

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1. In West Virginia, the circuit courts are the only trial courts of general jurisdiction.

possibility of parole. His timely 75 page Petition for Appeal, accompanied by the record of his trial, was presented orally by his appellate counsel to all five Justices of the Supreme Court of Appeals of West Virginia, who voted (3-2) to "refuse" his Petition.[2]

Petitioner then filed a 112 page petition for a writ of habeas corpus with the Circuit Court of Monongalia County, West Virginia, raising all issues raised in his direct appeal. On October 1, 1987, the circuit court held an omnibus hearing, after which it issued an order addressing the merits of all issues raised and denying the petition on the merits (said order is reproduced in the Appendix hereto). Petitioner appealed the circuit court's ruling to the West Virginia Supreme Court of Appeals, which Court *granted* the appeal and, after full briefing and argument on the merits, affirmed the circuit court's denial. *Billotti v. Dodrill,* 183 W. Va. 48, 394 S.E.2d 32 (1990).

The proceedings below commenced when Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Northern District of West Virginia, which court granted summary judgment to the State and denied the petition on the merits.[3] The United States Court of Appeals for the Fourth Circuit affirmed,[4]

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2. Minute Order dated February 14, 1985. In West Virginia, as in Virginia, "there is no appeal as of right from a criminal conviction." Jackson v. Virginia, 443 U.S. 307, at 311, fn 4, 99 S. Ct. 2781, 61 L. Ed. 2d 560, 568, at fn. 4 (1979). The effect of a refusal is to affirm the conviction on the merits. After said refusal, Petitioner did not seek a writ of certiorari from this Court.
3. Billotti v. Legursky, No. 91-0022-E (N.D. W. Va. November 19, 1991).
4. Billotti v. Legursky, 975 F.2d 113 (4th Cir. 1992).

and the petitioner seeks Certiorari review of that affirmation.

Throughout each step in the post-conviction process, petitioner raised the same grounds he now raises in his petition before this Court. However, it should be noted that he never requested the trial court to give the jury any "guidelines" to control their discretion to grant mercy. (Had the jury elected to grant mercy, petitioner would have been eligible for parole after serving ten years of his life sentence. W. Va. Code § 62-3-15.) Only after the jury elected not to grant mercy did he first suggest, in his direct appeal, that such "guidelines" were required.

B. Petitioner's Insanity Defense.

At his trial, petitioner admitted killing his family and relied wholly on an insanity defense. Most of the factual predicate for the defense was his own testimony. He described feelings of nervousness and paranoia which led him to construct a fully stocked bomb shelter, maintain a large stock of guns, and to invest in a formidable gate at the entrance to his property (Tr. at 452-53). He so fortified his residence, he said, to combat "some unknown enemy" he thought was lurking in the woods surrounding his house (Tr. at 452, 470).

When he killed his wife and daughters, petitioner said he thought he was shooting at this "unknown enemy" (Tr. at 468). He said that, on the evening of the killings, he and his wife shared some marijuana, and then "the [paranoid] feelings doubled" (Tr. at 466). He also described visual and auditory distortions, and said he passed out twice (Tr. at 466-67). Upon regaining

consciousness, he described himself as "in a frenzy", grabbed a .45 automatic pistol from the living room, put down the pistol, ran into his bedroom, grabbed a 12-gauge shotgun, and started firing, killing his wife and daughters. Petitioner then turned the gun on himself, wounding the right side of his head (Tr. at 364-65, 429, 466-69, 492-93).

The following day, petitioner admitted to his cousin and a paramedic that he had killed his family. The paramedic testified:

> . . . And I asked him who were all dead, who was dead, and he stated, "My wife and daughters. I killed them. You had better send somebody out there. They are all dead."

(Tr. at 418).

The paramedic and the physicians who treated petitioner described him as alert and responsive (Tr. at 340-41, 346-47, 348-49, 416-17). One of the doctors administered a test to measure petitioner's alertness; petitioner received the highest possible score (Tr. at 347-48).

At trial, three psychiatrists, Drs. Mullins, Allen and Sine, *relying entirely on petitioner's descriptions of himself,* testified that petitioner did not appreciate the wrongfulness of his actions. The accounts petitioner gave the doctors of his history of drug use, and of his mental state, were inconsistent, and the doctors could not agree on a diagnosis (Tr. at 516, 558, 579).

Petitioner told only Dr. Mullins that he believed that aliens were trying to contact him so that he might serve

as a medium of communication for the world, and mentioned the aliens only after she had thrice asked him about his feelings that he was being watched, and then only after much deliberation (Tr. at 561). About the night of the killings, petitioner told Dr. Mullins about sharing marijuana with his wife, and about a few things which took place in the living room, but left out the amphetamines and the circumstances of the killings (Tr. at 532-53).[5]

Petitioner told Dr. Allen about the marijuana and that he "snorted some crystalline substance that may or may not be an amphetamine" for four days prior to the killings "to get away from things, to relax" (Tr. at 509, 581).

Dr. Allen testified that petitioner was a paranoid schizophrenic (Tr. at 526). Dr. Sine testified that petitioner was not psychotic, and attributed petitioner's psychotic state at the time of the killings entirely to his self-reported drug use. (Tr. at 571-85). Dr. Mullins couldn't reach a firm diagnosis, but offered three different possibilities -- organic delusional syndrome, atypical paranoid disorder, or schizoaffective disorder (Tr. at 546-48).

Though the doctors disagreed about the proper diagnosis, all agreed that a different patient history would likely result in a different diagnosis (Tr. at 524, 566, 580). Likewise, all depended entirely on petitioner's

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5. The State presented rebuttal evidence that there was no trace of marijuana in Carolyn Billotti's body, as well as the testimony of the Billotti's best friend that she had never seen any indication that the Billottis used drugs. (Tr. 607, 612).

inconsistent and largely uncorroborated accounts as the factual basis of their opinions (Tr. at 516, 566, 679).

The jury also heard from lay witnesses who knew the Billottis. Petitioner's mother testified that petitioner was protective and controlling. "He wanted to determine, pretty much, what everyone in his family did." (Tr. at 598). Jeffrey Nichols had spoken to petitioner on on the day of the killings and noticed no irregularities in his behavior (Tr. at 283-85). Betty Maditz testified that she was probably the Billottis' closest friend. She recounted an anecdote demonstrating petitioner's penchant for unreasonable outrage, but said that she had gone shopping with the Billottis six days before the killings and that petitioner acted in a perfectly ordinary manner. She had never known the Billottis to use drugs (Tr. at 605-12).

At trial, the jury rejected petitioner's claim of insanity, and convicted him of three counts of first-degree murder without possibility of parole.

SUMMARY OF ARGUMENT

The Fourth Circuit correctly held that West Virginia's appellate procedure provided petitioner due process of law. West Virginia has a two-tier court system. The circuit courts are the trial courts of record in civil and criminal actions, and the West Virginia Supreme Court of Appeals is the only appellate tribunal. Appeals are discretionary in both civil and criminal matters. However, all criminal defendants, such as Billotti, have a constitutional right to file a petition for review with the Supreme Court of Appeals. *W.Va. Const.* art. VIII, § 4. Under West Virginia law and procedure,

criminal defendants have a right to appellate counsel, and a transcript of their trial. Counsel may orally present the petition for review to all five justices of said court. Billotti availed himself of all these rights.

In a criminal case, due process is violated only when a state's procedures "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as 'fundamental.'" *Medina v. California*, 112 S. Ct. 2572, 2577, 120 L. Ed. 2d. 353 (1992); *reh'g denied*, 113 S. Ct. 19 (1992). There is no fundamental right to appeal a conviction in American Jurisprudence. See, *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). Further, West Virginia's procedure for review of petitions for appeal provides a meaningful opportunity to be heard which comports fully with fundamental concepts of due process.

As his second ground for certiorari, petitioner requests this court to extend the rationale of its death-penalty cases to sentences of life-imprisonment, and thereby mould the concepts of Cruel and Unusual Punishment and Due Process so as to require the States to provide jurors with guidelines to control their discretion, if any, to exercise leniency in sentencing. West Virginia, like several other states, by statute empowers the jury to "recommend mercy" when they find a defendant guilty of a crime punishable by life imprisonment, which "recommendation" renders the defendant eligible for parole after serving ten years. *W. Va. Code* § 62-3-15. Said states uniformly prohibit the use of judicially formulated guidelines to control the jury's statutory discretion, and thus there is no conflict of decisions on this issue. Further, this Court has repeatedly declined to extend its death-penalty decisions to life-imprisonment. *Harmelin v. Michigan*, ___ U.S. ___,

111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). This is an inappropriate case to consider petitioner's theory in any event, as he requested no such guidelines at trial and has not suggested at anytime what standards should be required, nor how he would have benefitted from them.

Lastly, petitioner complains that the Due Process Clause required the trial court to direct a verdict of "not guilty by reason of insanity" due to the alleged evidentiary insufficiency of the State's rebuttal of petitioner's affirmative insanity defense. Sanity is not an element of murder in West Virginia, so the Due Process Clause does not require the State to meet any particular burden of proof. *Engle v. Isaac*, 456 U.S. 107, 121 (1982). The crux of petitioner's Due Process argument is the failure of the State to produce expert testimony at trial, but this Court has specifically held that such expert rebuttal is not required by the Due Process Clause on the issue of sanity. *Moore v. Duckworth*, 443 U.S. 713 (1979).

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER WAS AFFORDED DUE PROCESS BY WEST VIRGINIA'S SYSTEM OF DISCRETIONARY APPEALS

A. There is No Constitutional Right To Appeal From a Criminal Conviction

It is a well-settled principle that an appeal of right from a criminal conviction is not a necessary element of due process of law. *Jones v. Barnes, 463 U.S. 745, 756, n.1, 103 (1983); Griffin v. Illinois*, 351 U.S. 12, 20-21, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *reh'g denied*, 351 U.S. 958 (1956); *McKane v. Durston*, 153 U.S. 684, 687, 145 S. Ct. 913, 38 L. Ed. 867 (1894).

In *McKane*, 153 U.S. at 687, the court stated that:

> An appeal from a judgement of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.

Some sixty years later, Justice Frankfurter noted in *Griffin v. Illinois*, 351 U.S. at 20-21, that "it is now well-settled that due process of law does not require a state to afford review of criminal judgments."

Finally, in 1983, the court in *Jones v. Barnes*, 463 U.S. at 756, n.1, reaffirmed that there is no constitutional right to appeal a criminal conviction.

Accordingly, West Virginia's system of discretionary appeals afforded Mr. Billotti more than the Due Process Clause requires.

B. West Virginia Provides An Adequate Opportunity For Review of a Conviction.

While appeals of right from criminal convictions are not constitutionally required, a state may not arbitrarily deny access to an existing appellate procedure. *Griffin*, 351 U.S. at 37. West Virginia provides procedures which uniformly guarantee to convicted defendants a fair and meaningful opportunity to be heard, and petitioner availed himself fully of these procedures.

Although the decision to grant an appeal is discretionary, article VIII, § 4 of the West Virginia Constitution creates an absolute right for an individual convicted of a crime to petition for an appeal. *State v. Legg*, 51 W. Va. 401, 151 S.E.2d 215 (1966). The denial of the right to file a petition for review has been held by the State's highest Court to constitute a violation of both state and federal due process guarantees. *Carrico v. Griffith*, 165 W. Va. 812, 272 S.E.2d 235 (1980); *State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979); *State ex rel. Johnson v. McKenzie*, 159 W. Va. 795, 226 S.E.2d 721 (1976).

Mr. Billotti argues that West Virginia's procedure is constitutionally flawed because it does not guarantee adversarial appellate review of the trial court's determination. However, the discretionary petition for review employed by the Supreme Court of Appeals contains all the "essential elements" of appellate review set forth by the ABA's Appellate Standard 3.10 which provides:

> In some jurisdictions, appellate review is provided through a procedure in which the applicant seeking leave to appeal presents a petition that is considered by a panel of the appellate court; the case is heard by the court as a whole only if the the panel grants the petition. So long as the procedure for application involves the essential elements of the opportunity to be heard, this type of procedure in substance resembles that in which a type of appeal is first heard by a division of a court and then considered en banc. The essential elements of the opportunity to be heard in appellate litigation are the rights to: (1) present the record of the proceedings below, (2) submit written argument in the form of briefs, (3) present oral argument except in cases where it has so little utility that it may justly be denied, and (4) thoughtful consideration of the merits of the case by at least three judges of the court. Procedures for appellate review that lack these elements do not provide a true appeal of right [Footnote omitted].

American Bar Association Commission on Standards of Judicial Administration: *Standards Relating to Appellate Courts* (1977). The rules of the West Virginia Supreme Court of Appeals provide these "essential elements." The petition for review must state:

1. the kind of proceeding and nature of the ruling in the lower tribunal;

2. a statement of the facts of the case;

3. the assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal; and

4. points and authorities relied upon, a discussion of law, and the relief prayed for.

W. Va. R. App. P. 3(c).

The petition for appeal can be up to fifty (50) pages in length and may be longer (as in Billotti's appeal) with leave of the court. *Id.* The convicted petitioner may submit the trial transcript and other materials for the court's consideration. See, *W. Va. R. App. P. 5.* West Virginia Constitution art. VIII, § 4, provides that at least one Supreme Court Justice will review the petition and argument to decide whether there is an error justifying granting the appeal.[6] . However, internal operating procedures of the court provide that all five justices hear

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6. W. Va. Const. art. VIII, § 4. Billotti has no standing to challenge this provision because he received a hearing before all five members of the Supreme Court of Appeals. All five members considered his petition and voted (3-2) to deny the appeal.

argument and vote on whether to grant an appeal (Appendix to Petition, p. 6a).

Moreover, the right to petition for appeal is accompanied by an array of procedural protections that satisfy all the requirements which this Court has held to be mandatory (as to indigents) when a state grants an appeal of right. An indigent criminal defendant in West Virginia has a right to competent representation by counsel during appeal. *Rhodes v. Leverette,* 160 W. Va. 289, 239 S.E.2d 136 (1977)); State ex rel. *Bratcher v. Cooke,* 155 W. Va. 850, 188 S.E.2d 769 (1972). Counsel's performance in the appeal must be effective under constitutional standards. *Bratcher,* 188 S.E.2d at 769, *Evitts v. Lucey,* 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *reh'g denied,* 470 U.S. 1065, (1985). An indigent defendant has a right to obtain a free transcript for appeal. *State ex rel. Johnson v. McKenzie,* 159 W.Va. 795, 226 S.E.2d 721, 724 (1976). West Virginia also provides for collateral post-conviction review for claims of constitutional deprivation. *W.Va. Code,* §53-4A-1.

C. Mr. Billotti Availed Himself of the Full Panoply of West Virginia's Post-Conviction Remedies, Including A State Habeas Corpus Proceeding In Which All Errors Alleged In His Direct Appeal Were Fully Argued And Determined On The Merits.

Mr. Billotti's counsel filed a substantial (75 page) petition for direct appeal, accompanied by the trial transcript, with the Supreme Court of Appeals citing all alleged errors of fact and law addressed in the proceedings below, and made an oral presentation before all five of the justices, who voted (3-2) to refuse the appeal. The review thus obtained by Billotti under

West Virginia's discretionary appeal procedure was superior to mandatory appeals in some other jurisdictions in which there is no oral argument, screening is conducted by staff attorneys rather than judges, and only limited briefing is permitted. See, Daniel J. Meador, *Appellate Courts: Staff and Process in the Crisis of Volume*, at pp 168-171 (1974). (Arguing that modern abbreviated appellate procedures are functionally indistinguishable from discretionary review.)

Mr. Billotti also availed himself of his statutory right to seek post-conviction habeas corpus relief under W. Va. Code § 53-4A-1, *et seq.* by filing with the Circuit Court of Monongalia County a 112 page Petition for Habeas Corpus drafted, and subsequently argued, by retained counsel. Said circuit court issued a 15 page order disposing of all errors therein alleged, whether cognizable in habeas corpus or not, on the merits (Appendix hereto). In this manner every error in Mr. Billotti's direct Petition for Appeal to the State Supreme Court was addressed by the circuit court after adversarial proceedings.

Mr. Billotti's appeal from said 15 page order was *granted* by the West Virginia Supreme Court of Appeals, which subsequently issued a published opinion affirming the circuit court's decision to deny relief. *Billotti v. Dodrill,* 183 W. Va. 48, 394 S.E.2d 32 (1990).

Throughout the subsequent federal habeas corpus proceedings which culminated with the Petition for Certiorari filed here, petitioner Billotti has never even *suggested* that he was prejudiced by the failure of the Supreme Court of Appeals to grant his direct appeal, nor could he, in light of the complete adversarial review later obtained in state court.

Thus, this Court should not grant certiorari to consider the alleged due process violation, as it simply could not affect the result below nor afford petitioner any rights he has not already exercised in full.

II.
THE COURT OF APPEALS CORRECTLY DETERMINED THAT DUE PROCESS DOES NOT REQUIRE THAT A JURY BE GIVEN GUIDELINES TO CONTROL ITS DISCRETION TO BE LENIENT IN A NON-CAPITAL CASE

A. There Is No Conflict of Opinions Among States or Circuits on the Issue of Jury Sentencing Discretion in Non-capital Cases.

The petition for certiorari requests this Court to construct a theory whereby the concepts of Cruel and Unusual Punishment and Due Process would be moulded to require states to provide jurors with guidelines to control their statutory power to exercise sentencing leniency in non-capital cases. However, the petition points to no body-of-law from any jurisdiction supporting such a view.

In West Virginia, first degree murder is punishable by life imprisonment without parole, but the convicting jury "may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole [after serving ten years of his life sentence]." *W.Va. Code,* § 62-3-15. Mr. Billotti's jury was so instructed, but declined to grant him mercy. Like every other state where the decision to recommend mercy is left entirely within the discretion of

the jury and is made binding on the trial court, West Virginia law holds that an instruction which enumerates instances or suggests when a mercy recommendation might be appropriate is reversible error. *State v. Miller,* 178 W. Va. 618, 363 S.E.2d 504, 508 (1987); *Cohen v. State,* 116 Ga. 573, 42 S.E 781 (1902); *State v. Martin,* 92 N.J.L. 436, 106 A. 385 (1919); *State v. Jones,* 201 S.C. 403, 23 S.E.2d 387 (1942); *Annot.,* 138 A.L.R. 1222 (1942); *Annot.*, 87 A.L.R. 1363 (1933); *Annot.*, 17 A.L.R. 1117, 1129 (1922). These authorities are predicated on the theory that courts should not limit a jury's statutory discretion to be lenient unless the legislature imposes such constraints.

B. The Proceedings Below Did Not Adequately Develop This Issue.

Mr. Billotti apparently agreed with the above-cited authorities at trial, as neither he nor his counsel requested the trial court to instruct his jurors as to any "guidelines" which might have been formulated to control their discretion. Only *after* they opted *not* to grant mercy did he first suggest (in his direct appeal) that the failure to provide the jury with guidelines was reversible error. (Query: If petitioner were retried, would he want standards at his retrial? If so, he hasn't so stated.) And at no time has he ever suggested to any court, including this one, the content of the guidelines which he now claims should have been utilized at trial.

Though the Fourth Circuit, in its opinion below, addressed the merits of petitioner's argument in spite of this procedural vacuum, it was singularly unimpressed with petitioner's implied argument that the federal judiciary should impose such guidelines on state jurors:

> The hazards of this enterprise are underscored by the fact that petitioner has not suggested to us what standards we should require for the exercise of mercy by a West Virginia jury or even what standards he would have requested in this case. The jury was instructed to disregard passions, biases, or stricken testimony in its deliberations, and the jury further listened at great length to what was manifestly petitioner's strongest claim for mercy -- his mental state at the time that he committed the acts. We can thus discern no violation of due process in the manner in which petitioner's plea for mercy was submitted in this case.

(Appendix to Petition, p. 9a). One reason why the Fourth Circuit could "discern no violation of due process" is petitioner's failure to suggest how more detailed, or different, instructions would have benefitted him.

Instead, he asks this Court to speculate:

> Did the jury discriminate against the petitioner due to his Italian ancestry? his religion? his economic condition? his gender? We do not know.

(Petition at p. 21.) Of course, the above quoted invitation *assumes,* rather than proves, that the jury was motivated to "discriminate against petitioner". The record does not support this assumption, nor does petitioner point to any evidence or argument calculated to impermissably inflame the jury or to emphasize petitioner's reasonably successful economic status or his white-male heritage.

If petitioner wishes this Court to so speculate, should he not assist the Court by formulating the guidelines he desires and showing how he was prejudiced by their absence?

Thus, the record in this case is inadequate to properly address the question presented.

C. The Decisions Below Do Not Conflict With Any Decision Of This Court.

Petitioner insists on applying this Court's reasoning in capital cases to life sentences, which this Court has repeatedly indicated it will not do, "Legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in non-capital cases. . ." *Lockett v. Ohio,* 438 U.S. 586, 603 (1978).

Petitioner's best hope resides in *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), wherein this Court held that proportionality analysis was not "entirely inapplicable in noncapital cases." Assuming this holding was not overruled by *Harmelin v. Michigan,* 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), it is still unavailing, as not even *Solem* gives the special status to life sentences upon which petitioner relies to establish a constitutional right to jury sentencing guidelines. *Solem* merely reaffirms that proportionality *review* can be applied by appellate courts to sentences of imprisonment. The particular sentence reviewed in *Solem* was a life sentence, but nothing in the opinion is limited to life sentences, or accords special significance thereto, or suggests that *juries* should perform a proportionality analysis. The Court reaffirmed the

language in *Furman v. Georgia*, 408 U.S. 238, 272, 306, 33 L.Ed.2d 346, 92 S. Ct. 2726 (1972); reh'g denied, 409 U.S. 902 (1972), that "the penalty of death differs from all other forms of criminal punishment, not in degree but in kind," and "our decisions in capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Solem v. Helm, supra*, 463 U.S. at 289. It also reaffirmed that, except in very unusual cases, legislatures retain "broad authority" to determine the types and limits of punishments for crimes. 463 U.S. at 290.

The language in the *Solem* opinion relied upon by appellant, which accords special significance to life sentences, is the Court's paraphrasing of the decision below, which language does not form any part of the Court's holding, opinion, or policy rationale.

As in *Harmelin v. Michigan, supra*, "[p]etitioner asks us to extend this so-called 'individualized capital sentencing doctrine,' to an 'individualized mandatory life in prison without parole sentencing doctrine.' We refuse to do so." 115 L.Ed.2d at p. 865.

III.

UNDER THIS COURT'S DECISION IN *MOORE V. DUCKWORTH*, 443 U.S. 713 (1979) THE STATE'S EVIDENCE WAS SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT PETITIONER WAS SANE WHEN HE KILLED HIS WIFE AND CHILDREN

A. The Petition Mischaracterizes The Record Below By Suggesting That The Trial Court Withheld The Sanity Issue From The Jury.

Petitioner's "Questions Presented", as well as his argument, incorrectly allege that the state judge at his trial "ruled that the issue of insanity had not been raised and permitted the State to rely on a presumption of sanity rather than having to prove beyond a reasonable doubt that petitioner was sane" (petition at 22-23). This is not the case. The trial judge submitted the sanity issue to the jury, properly and thoroughly instructing the jury on the law regarding insanity in West Virginia.

> In this case you have heard testimony concerning the sanity or lack of sanity of the defendant. When an accused is relying upon the defense of insanity at time of the crime charged, the jury is instructed (1) that there is a presumption the accused was sane at that time; (2) that the burden is upon him to show that he was then insane; (3) that if any evidence introduced by him or by the State fairly raises doubt upon the issue of his sanity at that time the presumption ceases to exist;

> (4) that the State then has the burden to establish sanity of the accused beyond a reasonable doubt, and, (5) that if the whole of the proof upon that issue leaves the jury with a reasonable doubt as to the defendant's sanity at that time the jury must accord him the benefit of the doubt and acquit him.

(Instructions at 15). *Edwards v. Leverette,* 163 W. Va. 571, 280 S.E.2d 545 (1979). The trial court's jury instructions concerning insanity went on to define sanity, explain its elements, and to describe the further dispositon of the case if the jury were to find petitioner insane. The instructions also thoroughly addressed petitioner's "intoxication" defense based on his self-reported use of drugs on the night of the murder (Instructions at 16-19). Petitioner's assertion here that the trial court ruled that insanity had not been raised is a mischaracterization of the record.

B. The Due Process Clause Does Not Require The State To Produce Experts To Rebut Experts.

Given that the State's cross-examination of the defense experts, and its lay rebuttal witnesses, disputed petitioner's insanity defense, the only question fairly raised by the petition is whether the due process clause also required the State to produce expert rebuttal witnesses to sustain its burden of proof.

In West Virginia, sanity may be established by either expert or by lay testimony, and lay testimony may rebut expert testimony where it is employed. *State v. McWilliams*, 352 S.E.2d 220, 129 (1986); *Billotti v. Dodrill*,

394 S.E.2d 32, 42 (1990). The question of a defendant's sanity is one for jury resolution in West Virginia, and the testimony of expert witnesses is not exclusive; the jury has the right to weigh the testimony of all witnesses, experts and otherwise. *State v. Wimer*, 284 S.E.2d 890 (1981). On these very facts, the West Virginia Supreme Court of Appeals held that the evidence presented was sufficient for the jury to find that petitioner was sane at the time he killed his family:

> It is the opinion of this Court that, in this case, the issue of defendant's sanity was properly presented to the jury and there was sufficient evidence for the jury to find that the defendant was sane beyond a reasonable doubt.

Billotti, 394 S.E.2d at 42.

This Court's decision in *Moore v. Duckworth*, 443 U.S. 713, 99 S. Ct. 3088, 61 L. Ed. 2d 865 (1979) is dispositive of petitioner's claim that the State's rebuttal of his insanity defense was insufficient under *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In *Moore*, this Court upheld under *Jackson* petitioner's second-degree murder conviction, rejecting his challenge to the sufficiency of the State's evidence of sanity. The petitioner in *Moore* argued that the state had failed to meet its burden of rebutting his insanity defense because it relied solely upon lay witnesses to rebut the defense experts. This Court agreed that the *Moore* petitioner was entitled to a determination of whether the record evidence could support a finding of guilty beyond a reasonable doubt; but refused upset the verdict:

> The petitioner has contended that the prosecution failed to meet its burden because it relied upon lay witnesses to prove sanity without providing any expert testimony to rebut his expert opinion testimony. But, as the Court of Appeals noted, under Indiana law sanity may be established by either expert or lay testimony. The State appellate court, in an opinion thoroughly discussing the record evidence and the petitioner's sufficiency challenge concluded that the lay evidence in this case could have been credited by the jury, and it held that the State's evidence was fully sufficient to support a jury finding beyond a reasonable doubt that the petitioner was sane at the time of the killing.

Moore, 443 U.S. at 714.

These words could just as well have been written in reference to the present case. Here, petitioner likewise contends the State's rebuttal evidence was insufficient to prove his sanity at the time of the killings. (This contention can only be construed as an argument that experts are required to rebut experts.) But the West Virginia Supreme Court, and the courts below, all found his claim to be meritless. *Billotti,* 394 S.E.2d 32 (1990); *Billotti v. Legursky*, No. 91-0022-E (N.D. W.Va. November 19, 1991); *Billotti v. Legursky*, 975 F.2d 113 (4th Cir. 1992).

The Fourth Circuit properly addressed this issue in its opinion:

> The [defense] psychiatrists did testify that petitioner was incapable of determining the

> wrongfulness of his acts at the time of the shootings. The weight of this testimony was substantially undercut, however, by the doctors' disagreement over the diagnosis and the relationship between Billotti's drug use and his mental impairment. In addition, Billotti appeared to have given inconsistent accounts to the doctors. As the district court noted, "the credibility of the testimony is obviously diminished in these circumstances." Moreover, a number of lay witnesses testified concerning their contemporaneous observations of Billotti and his seemingly normal behavior at that time. Some of those witnesses were friends or acquaintances of Billotti and his family. Viewing the evidence in the light most favorable to the prosecution, we cannot say that a rational trier of fact could not have concluded that Billotti was sane at the time of the shootings.

Billotti, 975 F.2d 113.

Moreover, each expert testified that their testimony was based wholly on the patient history they elicited from petitioner (Tr. at 524, 566, 580). As set forth in the Statement of the Case, the accounts petitioner gave the experts were inconsistent, particularly regarding his use of drugs. Petitioner alleged that he had snorted an amphetamine before the murders. But the identity of the amphetamine was never established at trial. He said that he and his wife had smoked a joint of marijuana just before he killed her. But there was no trace of marijuana residue in his wife's body. He told each of the experts a story about using drugs. But each of the stories were different. And each of the experts testified that a

different patient history would likely result in a different diagnosis. This is not the type of evidence which would prevent any reasonable juror from finding petitioner to be sane when he killed his family.

Petitioner here has had his claim regarding insufficiency of evidence examined repeatedly on the merits as he has progressed through his post-conviction remedies. He therefore has had the review of his conviction in light of *Jackson* that even the petitioner in *Moore* did not receive. For these reasons, *Moore* is dispositive of this case, and this Court should refuse to grant certiorari on this basis.

C. Sanity Is Not An Element Of Murder Under West Virginia Law, And Thus The Sufficiency Of The State's Evidence Of Sanity Does Not Present A Due Process Issue.

The doctrine of *In re Winship*, 397 U.S. 358 (1970), and its progeny (including *Jackson v. Virginia, supra*), requires the State to prove beyond a reasonable doubt all essential elements of a criminal offense. Due process does *not* require, however, that the State negate an affirmative defense by proof beyond a reasonable doubt, unless state law characterizes the negation of the defense as an element of the crime. *Engle v. Isaac*, 456 U.S. 107, 121, 102 S. Ct. 1558, 1568, 71 L. Ed. 2d 783 (1982).

The West Virginia Supreme Court of Appeals has taken great care to avoid characterizing sanity as an element of murder (or any other crime). In discussing its 1979 decision requiring that sanity be proven beyond a reasonable doubt after defendant introduces evidence of insanity, the State's highest court stated:

> The purpose of the rule [of *Edwards v. Leverette, supra,*] is to correlate the State's burden of proof beyond a reasonable doubt to all the facts necessary to establish the defendant's culpability. These facts include not only the essential elements of the offense charged, but also a negation beyond a reasonable doubt of those defenses which, if shown, would constitute an absolute bar to conviction or justification for the crime . . . This same principle was recognized in *Kirtley*, as to the self-defense issue, where we stated:
>
> > [W]e wish to make clear that our announced rule on allocating the burden or proof on the issue of self-defense is not bottomed on constitutional due process principles as it has been in some jurisdictions . . . . [252 S.E.2d at 381.]

State v. Milam, 163 W. Va. 752, 260 S.E.2d 295, at 300-301 (1979),

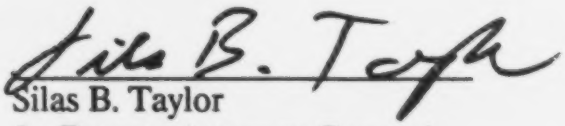
Consequently, no due process issue is presented by the State's choice of allocation of the burden of proof, nor by the sufficiency of the State's evidence of sanity. *Duffy v. Foltz,* 804 F.2d 50 (6th Cir. 1986).

CONCLUSION

For the reasons stated, respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,

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Originally filed February 22, 1993, revised February 24, 1993.

APPENDIX
IN THE CIRCUIT COURT OF MONONGALIA COUNTY

FRANK BILLOTTI,

Petitioner,

v.

Civil Action No. _____
(Monongalia County Felony #83-F-8)

A. V. DODDRILL, JR.
Commissioner of West Virginia
Department of Corrections, and
JERRY HEDRICK, Warden, West
Virginia State Penitentiary,

Respondents.

ORDER

On October 1, 1987, the Petitioner appeared in person and with his attorney, James McKowen, and the Respondents appeared by and through the Prosecuting Attorney Susan B. Tucker and Assistant Prosecuting Attorney Marcia L. Ashdown, with the Honorable Larry V. Starcher presiding, for a hearing on the Petitioner's Writ of Habeas Corpus which had been filed at a previous time. The Court Ordered that a hearing be

scheduled which would be considered an omnibus hearing, granting an opportunity to the Petitioner to raise all grounds for relief in habeas corpus. To that end, the Court notes that the Petitioner's original Petition is lengthy, containing many claims for relief which are supported by legal argument. Thereafter, the Petitioner filed his Response to Respondents' Return and Additional Points and Authorities, which was filed pursuant to the Return prepared by the Respondents. Subsequent to this Response, the Petitioner also filed an Amended Petition containing additional points raised by the Petitioner himself. Accordingly, the Court finds that the Petitioner has raised all of the claims which he has determined to have merit and to be cognizable under a petition for writ of habeas corpus, and finds that the Petitioner has waived any other grounds for relief by his failure to raise them for the purpose of his hearing.

At the hearing on October 1, 1987, the Petitioner's attorney informed the Court that it was his intention to present oral argument pertaining to only three of the ten claims for relief contained in the original Petition. Counsel further informed the Court that he wished for the Court to consider the other issues raised in the Petition based upon argument contained therein.

Following presentation of argument by counsel for the Petitioner and by counsel for the Respondents, the Court informed the parties that ruling on the claims for relief would be held in abeyance pending review and consideration by the Court. In the interim, the Court ORDERED that the Petitioner be returned to the Penitentiary at Moundsville. The Court now renders its opinion as to the claim for relief raised by the Petitioner.

I. ARGUMENTS PRESENTED ORALLY TO THE COURT:

1. The Petitioner argues that under the Due Process Clause of Fourteenth Amendment to the United States Constitution, a criminal defendant is entitled to at least one appeal as of right where a sentence of life without mercy has been imposed. In McKane v. Durston, 153 U.S. 684 (1894), the United States Supreme Court ruled that:

> An appeal from a judgment of conviction is not a matter of absolute right, independent of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not allow such review.

This decision has never been overruled and the Court is aware of Foye v. Bordenkircher, 535 F. Supp. 1340 (N.D. W. Va. 1982) in which this issue was considered. The Fourth Circuit held that "the Federal Constitution does not require that a criminal defendant be provided an appeal from his conviction, Id. at 1341."

The State of West Virginia does not have a statute providing for automatic appeal and review in criminal cases. This is clearly not contrary to the decisions of the United States Supreme Court. Those convicted of criminal offenses in West Virginia have, by statute, the

right to apply for an appeal, and this right has been found sufficient to meet the requirements of due process. Therefore, this Court finds that there is no violation of state or federal law which would provide the Petitioner with grounds for relief upon this claim.

2. The Petitioner asserts that the trial court erred in failing to enter a judgment of not guilty by reason of insanity at the close of the State's case-in-chief or after arguing that the State's evidence concerning the Petitioner's sanity was manifestly inadequate at ether stage to convince impartial minds of his sanity beyond a reasonable doubt.

This Court does not find merit in the Petitioner's argument regarding proof at trial as to his insanity. The record shows that, among the psychiatrists who testified as experts, there was disagreement as to the appropriate diagnosis of the Petitioner as well as disagreement in other aspects of their testimony. Where there is conflict and disagreement in the testimony of the various witnesses, it is clear that the jury must determine the appropriate weight to give to the testimony presented. Equally, it is clear that "expert" testimony regarding insanity is nonexclusive on that issue, and the jury may consider all of the other evidence and testimony in determining the question of criminal responsibility.

Further, this Court is aware that the lay testimony regarding the Petitioner's insanity was also subject to interpretation by the jurors, as to whether that testimony showed the insanity of the Petitioner or, in the alternative, demonstrated his evil or malicious character. Additionally, the jurors had the opportunity to observe first-hand the testimony of the Petitioner. Therefore, the jury could assess the other evidence and testimony as to

how the crime occurred, comparing that evidence with the Petitioner's testimony and determining whether inconsistencies existed, and whether any inconsistencies might show criminal intent versus insanity.

This Court finds that the record show that the question of the Petitioner's insanity was clearly a jury issue. The Court believes that it was proper for the jurors to to determine the credibility of all of the witnesses, including the believability of the various experts in determining whether the petitioner suffered from a mental illness, and further, whether such an illness met the standard for legal insanity. The Court finds no violation of state or federal law upon which the relief sough under this claim can be granted.

3. It is asserted by the Petitioner that the trial court erred in refusing to direct a Verdict of Acquittal on the charges of First-Degree and Second-Degree Murder, because the State's evidence of malice, pre-meditation and deliberation was manifestly inadequate.

State v. Louk. 301 S.E.2d 596 (W. Va. 1983) says:

> Whether malice exists in a particular case is usually a question for the jury and although in perfectly clear case, the Courts have held that the evidence was not sufficient to show malice even where the jury had found to the contrary, yet malice is a subjective condition of mind, discoverable only by words and conduct, and the significance of the words and conduct of an accused person, whenever there can be doubt about such significance,

addresses itself peculiarly to the consideration of the jury. Citing Syllabus Point 4, *State v. Hamrick*, 112 W. Va. 157, 163 S.E.868 (1932).

The facts of this case are that three people were killed by the use of a firearm. In addition to the inference of malice which can arise from the intentional use of a deadly weapon, there is other evidence in the record which shows the Petitioner to have been a person of an aggressive and hostile nature. Further, the physical evidence presented in the testimony of Dr. Frost ad of Trooper Reyes supports the theory that two of the victims' backs were against the wall and that they were each shot and killed as the Petitioner advanced upon them. The third victim was shot in the back at close range. Both the State and the Petitioner had separate theories as to the reasons this event occurred, and the determination as tot whether malice in the mind of the Petitioner existed was properly accorded to the jury.

As to the correctness of permitting the jury to determine whether premeditation and deliberation existed, the Court also believes that no error was committed. The law is that "it is not necessary that the intention to kill should exists for any set length of time prior to the actual killing; it is only necessary that such intention should have come into existence for the first time at the time of such killing, or at any time previously." *State v. Schrader*, 288 S.E.2d 170 (W. Va. 1982); *Edwards v. Leverette*, 258 S.E.2d 436 (W. Va. 1979).

This Court is of the opinion that the record demonstrates that it was proper for the jury to consider malice and premeditation. Further, the Court believes

that the facts of the case (i.E., the manner in which the crime was committed), in combination with the jury';s opportunity to evaluate the witness testimony, including that of the Petitioner, could properly lead the jury to find malice and premeditation. Because these are subjective mental states the existence of which should be a jury question, the Court finds that it was not error to send these questions to the jury. The Court also believes that the jury's verdict is not contrary to the evidence. Therefor, again, the Court finds no violation of state or federal law which would provide the Petitioner with relief upon these grounds.

II. ADDITIONAL GROUNDS RAISED IN THE PETITION WHICH WERE NOT PRESENTED IN ORAL ARGUMENT:

1. It is argued by the Petitioner that the trial court committed error by refusing to include as a necessary element of each possible crime, that the Petitioner was sane at the time of the act, in order to counteract the "false suggestion" during voir dire that the Petitioner had the burden of proving his insanity. Review of the record shows that the jury was properly instructed on the issue of insanity in the Judge's charge to the jury. The Court properly instructed the jury that the law is the following:

> There exists in a trial of an accused a presumption of sanity; however, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense." State v. Milam, 260 S.E.2d 295, (W. Va. 1979); State v.

Daggett, 280 S.E.2d 545 (W. Va. 1981); State v. Bias, 301 S.E.2d 776 (W. Va. 1983).

The Billotti jury was charged precisely according to existing law and the Court finds no violation of law consistent with the granting of the relief of this claim.

The Petitioner also argues that there was improper suggestion made by the trial judge during voir dire concerning the Petitioner's burden of proof as to sanity. In reviewing the transcript of the voir dire process, the Court finds that taking together all of the questions and comments by both the Court and counsel there is no harm shown regarding the burden of proof at trial, and regarding a fair consideration by the jury as to the burdens of proof and persuasion. Further, the Court reiterates that the impaneled jurors were properly instructed as to the law and burdens of proof prior to their formal deliberations. Therefore, there is no error which would constitute grounds for relief under this claim by the Petitioner.

2. The Court instructed the jury that premeditation could spring into the mind of the Petitioner at the instant of the act. The Petitioner assigns this as error, asserting that this instruction obliterates the primary destinction [sic] between First and Second-Degree Murder. This instruction is not contrary to State law. In State v. Hatfield, 286 S.E.2d 402 (W. Va. 1982), essentially the same instruction was give by the trial court and upheld by the Supreme Court of Appeals. The Supreme Court of Appeals held that the instruction, considered together with all of the other instructions, clearly delineated the critical difference between First and Second-Degree Murder by stating that" "murder in the second degree is when one person kills another person unlawfully and

maliciously, but not premeditatedly." In Edwards v. Leverette, 258 S.E.2d 436 (W. Va. 1979), also a case before the Court on a habeas petition, this instruction was considered and found not to raise a constitutional question, and therefore, would not serve as a basis for relief in habeas corpus.

Based upon these and other cases, this Court finds no error or violation to support relief upon this claim.

3. Motions for Change of Venue prior to trial were denied. The Petitioner states that it is error for the trial court to have denied these motions.

Ruling on a defendant's Motion for Change of Venue rests in the discretion of the trial court. This Court, based upon a review of the record, is of the opinion that the law regarding change of venue was followed and that there was no abuse of discretion in the ruling. State v. Williams, 305 S.E.2d 251 (W. Va. 1983) says that the mere existence of wide-spread publicity is not, in and of itself, sufficient to require a change of venue, not is mere proof that prejudice exists against the accused. Rather, the Court stated the "good cause" which an accused must show to be entitled to a change of venue on the grounds of prejudicial pre-trial publicity in the existence of a present, hostile sentiment against him, arising from the adverse publicity, which extends throughout the County in the which the offense was committed, and which precludes the accused from receiving a fair trial in that County. See also State v. Peacher, 280 S.E.2d 289 (W. Va. 1981); State v. Boyd, 280 S.E.2d 669 (W. Va. 1981); State v. Beck, 286 S.E.2d 234 (W. Va. 1981); State v. Gangwer, 286 S.E.2d 389 (W. Va. 1982).

Using correct standards in making its decision, the trial court found that any negative sentiments toward the Petitioner did not rise to the level of making it impossible for him to obtain a fair trial in the County of the crime. Therefore, the Motion for Change of Venue was denied, and this Court does not now find that it was error to do so. There being no violation of law, this claim for relief must also be denied.

4. It is argued by the Petitioner that the trial court erred by expressing negative opinions during voir dire concerning the Petitioner's sole defense, i.e., insanity.

This Court finds that one comment complained of was clearly made outside of the presence of any potential jurors. Further, the juror under discussion during this colloquy between the Court and counsel was excused from jury service. Therefore, the Court finds that it is impossible for this comment, even if overheard by the potential juror, to have tainted the jury in any way.

Also, the Court finds that other statements made by the Judge, and complained of by the Petitioner, when placed in the context of the entire exchange, do not show prejudice to the Petitioner, or error. Rather, this comment by the trial judge appears to be an attempt to stress to the jurors that the questions and hypotheticals set forth by the attorneys in voir dire where [sic] not to be considered evidence or proven facts at that point and time. Based upon review of the record and due consideration, the Court finds that no violation of law was committed, and therefore relief must be denied upon his claim.

5. As grounds for relief, the Petitioner asserts that the trial court erred in ruling that three statements which

were made by the petitioner while severely injured, were voluntary.

This Court finds that an in-camera hearing was provided to determine the admissibility of these statements by the Petitioner, and the Court further finds that the in-camera hearing was properly conducted according to existing law. The proper standards include consideration of whether there was coercion or inducement, whether the defendant was intoxicated, whether the defendant was in the custody of State authorities, and whether the defendant had the mental capacity to make a voluntary statement. These issues are subjective and must be decided on the facts as they appear to the Court from the in-camera hearing. It is the law that the trial court's determination that a confession is admissible will not be disturbed unless he was plainly wrong. State v. Vance, 250 S.E.2d 146 (W. Va. 1978); State v. Gwinn, 288 S.E.2d 533 (W. Va. 1982); State v. Jackson, 298 S.E.2d 866 (W. Va. 1982).

After review, this Court determines that the Petitioner's statements were properly considered and the statements were properly admitted for the jury to assess and to accord the proper weight. The decision by the trial court appearing to be founded upon the law, this Court finds no violation of law and no basis for relief in habeas corpus.

6. The Petitioner argues that his sentence of life imprisonment without possibility of parole is void under the Constitution of the United States, because the trial court failed to set forth guidelines for the jury to use in determining whether there would be a recommendation for mercy or no recommendation for mercy if the verdict of First-Degree Murder was returned.

A review of the judge's charge to the jury reveals that the jury was properly instructed regarding the prerogative to recommend mercy and the effect of no recommendation. Because the jury instructions contained a proper statement of law, there is no violation of law which would provide grounds for relief. See, State v. Schoefield, 331 S.E.2d 829 (W. Va. 1985). The Court believes that the Petitioner's analogy of his sentencing process to jurisdictions which have the death penalty and which have developed bifurcated proceedings to first determine guilt, and secondly to determine penalty, is not appropriate. Frequently, in those jurisdictions, the penalty is determined by a separate jury from the jury which determined guilt. For this reason, and because of the seriousness of the possible penalty (death), guidelines have been developed for considering mitigating and aggravating circumstances. The Petitioner's jury fulfilled both functions, determining guilt and determining penalty. His jury had the opportunity to determine penalty based upon first-hand impressions of the trial evidence which would have revealed any mitigating or aggravating circumstances.

Further, the Court finds that the jury's verdict does not suggest that the jury acted in an arbitrary, irrational, or discriminatory manner. Again, there is no error or violation of law which would constitute grounds for relief based upon this claim.

7. The Petitioner cites cumulative error in the record thus denying his right to a fair trial. Because the Court finds no error in the trial, there can be no cumulative error found. Therefore, the Court finds that there was no denial of the Petitioner's right to have a fair

trial, and further finds that there is no violation of state or federal law as asserted.

III. Ruling:

The Court, finding no merit to the grounds for relief raised by the Petitioner in his original Petition for Writ of Habeas Corpus Ad Subjiciendum, or in his Amended Petition, does accordingly DENY relief for all of said grounds raised by the Petitioner. Therefore, the Court does hereby DISMISS the Petition and Amended Petition and does remand the Petitioner to the custody of the Warden at the State Penitentiary at Moundsville, West Virginia, for the completion of the Petitioner's sentence.

It is also ORDERED that a copy of this Order shall be provided by the Clerk of this Court to counsel for the Petitioner; to Jerry C. Hedrick, Warden of the State Penitentiary at Moundsville; and to A. V. Dodrill, Jr., Commissioner of the West Virginia Department of Corrections.

ENTERED: March 5. 1988

/s/ Larry W. Starcher

Judge /* ,